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Sent: Thursday, July 05, 2001 2:18 PM
To: MRM.comments@mms.gov
Subject: Please see attached.



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July 5, 2001

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Mr. Paul A. Knueven
Chief, Regulations and FOIA Team
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Denver, Colorado 80225

Re: Opposition to Selected Parts of Proposed Rule Concerning Solid Mineral Reporting Requirements, 66 Fed. Reg. 30121 (June 5, 2001), 30 C.F.R. Parts 206, 210, 216, and 218, RIN 1010-AC86

Dear Mr. Knueven:

These comments and recommendations are submitted on behalf of the Potash Association of New Mexico (PANM) in opposition to selected parts of the Proposed Rule published in the Federal Register on June 5, 2001 [66 Fed. Reg. 30121] amending 30 C. F. R. Parts 206, 210, 216, and 218, to require, among other things, the submission of confidential financial and business data wholly unnecessary, in our judgment, to Minerals Management Service's (MMS) ability to verify revenues due and paid to the government.

We appreciate this opportunity to comment on the proposed regulations. PANM is an association of underground mine operators with potassium leases and underground mining operations in the Secretary's designated "Potash Area" [see Order of the Secretary, 51 Fed. Reg. 39425, 39426, October 28, 1986] near Carlsbad, New Mexico. Its membership includes IMC Kalium Carlsbad, Inc. and Mississippi Potash, Inc., both of which have extensive mining operations in the Potash Area. Collectively, these mine operators own over 90% of all potassium leases in the Potash Area, including Federal and New Mexico State leases. They produce 100% of the potash mined in New Mexico and over 80% of all potash mined in the United States. Each mine operator, therefore, has participated in the leasing and paying of royalties to the Federal Government on solid minerals and has a substantial interest in the proposed rulemaking.

We support the effort of MMS to reengineer its regulatory operations to reduce the reporting burdens on mine operators. We also applaud its effort in establishing partnerships with various companies in the affected mineral industries to ensure that their comments and suggestions on the

July 5, 2001

Page 2

reengineering effort were received. We are disappointed, however, that in establishing these partnerships, MMS did not include a company from the Potash Industry but, instead, apparently focused its cooperative efforts in solid minerals on coal operators. It is perhaps this lack of early participation, coupled with the differences in the Potash Industry and other solid mineral producers, that now requires us to oppose those sections of the proposed rule that will require potash producers to routinely disclose to MMS the names of each potash producer's customers.

Submission of "Sales Summaries"

Under the proposed rule, as we understand it, a mine operator producing potash from a Federal potassium lease will be required to submit a monthly "Sales Summary." 30 C.F.R. 210.202, 66 Fed. Reg. at 30124. The information that must be included, according to the chart included in Section 210.202, is sales units, gross proceeds, processing or washing costs, name of product sold, and "other data," described as a royalty calculation worksheet. In addition, the proposed rule provides that the names or ID's of purchasers must be submitted "as requested." While not clearly stated in the proposed rule, we understand from earlier correspondence from MMS that the specified data must be summarized on an individual customer basis. See MMS "Dear Reporter" Letter dated March 13, 2001. We are opposed to these requirements for several reasons.

Lack of Need For Confidential Customer Lists

We object to the expansion of current reporting obligations to require that a potash producer routinely identify and submit to MMS the names of its customers even on an "as requested" basis. The identity of customers is highly confidential information in the Potash Industry. The disclosure of their identity, therefore, should not be required absent a compelling and demonstrated need. We do not believe MMS has identified any such need. Clearly, the names of customers are not required to determine the amount of royalties due from a potash producer. Nor are they required for any other monitoring or compliance purpose we have been able to identify.

We likewise do not believe there is anything about the audit process that justifies the routine submission of customer names. In those limited situations where MMS believes the name of a customer has some relevance during an audit, it can and should be requested and reviewed at the mine site at the time of the audit. This is the procedure that has been historically followed and we know of no difficulties that have been encountered which warrant such a drastic change. On the contrary, the current procedure serves the needs of both parties by providing MMS with access to all information it believes it needs to complete an audit and, at the same time, ensures that data treated as confidential by a potash producer is not removed from the mine property and unnecessarily exposed to disclosure.

Accordingly, we are opposed to any requirement that a potash producer submit to MMS the names of its customers except in the rare situation where the identify of a customer becomes relevant to some issue during an audit. In this limited situation, we are not opposed to disclosing customers name's as long as the information is limited to the individuals performing the audit, is not removed

July 5, 2001

Page 3

from the mine or other location where it is kept in the normal course of business, and is treated as confidential by the individuals performing the audit.

To incorporate this cooperative and historically successful approach into the Propose Rule, we recommend the following revisions:

1. In proposed § 210.202, revise the column entitled Sodium/potassium in the table included to eliminate "as requested" and insert "Not required."
2. We believe Proposed § 210.205 is broad enough to cover the rare situation when MMS believes the names of customers are somehow relevant during an audit and requests additional data.

No Justification for Submitting Sales Data By Customer

While not specifically addressed in the Proposed Rule, we understand from MMS correspondence dated March 13, 2001, addressed to "Dear Reporter," that MMS intends to require information in the Sales Summaries to be organized and submitted by individual customer. According to that letter, the monthly Sales Summaries must include detail sales data on an individual customer basis, including sales volume, sales proceeds, transportation or processing allowances, and product quality. We are also opposed to this requirement if it is, in fact, what MMS intends to require.

Our objection to this new requirement is based, in part, on the fact that it will require potash producers to submit to MMS data that has long been considered confidential. As already explained, the names of customers is considered confidential information and is treated as such by members of PANM. Detailed information regarding sales to customers is likewise considered confidential. By requiring these two types of confidential information to be organized and submitted together in a format understandable by anyone accessing the information, the potential adverse effects on a mine operator's competitive position from inadvertent disclosure is simply compounded. Indeed, if submitted in the format suggested by the March 13, 2001 MMS letter, every detail of every customer of every potash producer, complete with name, would be available to anyone accessing the information. There is simply no justification for imposing such a risk on potash producers.

In addition, we are opposed to this new requirement because there is no demonstrated need for either the names of customers or their sales data organized by individual customer. Perhaps the best evidence of this is the fact that MMS has not historically required the submission of such extensive data in the format being suggested. Like customer names, information concerning customer sales data has only been requested during an audit and then only if it becomes relevant to an audit issue. This longstanding practice is strong, if not conclusive, evidence that the information now being requested is not necessary for compliance or monitoring purposes. Given this clear lack of need for the information prior to an audit, the burden of organizing and submitting such information should not be imposed on mine operators absent some explanation of what, if anything, has changed to now make the information relevant to activities other than an audit.

For these reasons, we firmly believe that MMS should revise the Proposed Rule to eliminate the requirement that Sales Summaries contain the names of customers and sales data organized by individual customer, if that is their intent. Moreover, we believe the Proposed Rule should be clarified to clearly inform mine operators what data will be required and how it must be organized. Such important details should be in the Proposed Rule, not in "Dear Reporter" correspondence.

Identification of Customers By Unique ID's

Our concern over the expansion of the reporting requirements to include the names of customers and detailed sales data organized by customer is not relieved by the reference in proposed § 210.202 to the ability of a mine operator to use "Purchaser name" or "unique identification." While it is not entirely clear what "unique identification" means, we assume it means that instead of identifying customers by name, a potash producer can identify them by code. This is preferable to disclosing real names but would address our concerns only if the key to the code was maintained at the mine site and made available only to individuals performing an audit. If there is no demonstrated need for customer names prior to an audit, which there is not, then there is no need for MMS to have coded names. The inescapable fact is that the names of customers, whether stated or in code, as well as detailed sales data by customer, is not needed for compliance or monitoring. The only possible need for such information is during an audit. For this reason, a mine operator should not be required to prepare and submit the data on a monthly or any other basis prior to an audit.

Protection of Confidential Data

We are aware, of course, of the provisions of the Freedom of Information Act, 5 U.S.C. § 552 et seq. and the Department's implementing regulations, 43 C.F.R. § 2.11 et seq., and their application to confidential data. The existence of this limited protection should not, however, be justification for the requirement that confidential information be submitted when, as here, there is no demonstrated need for the data at any point prior to an audit and then only on rare occasions.

We also note that nowhere in the Proposed Rule is there any indication of how information submitted over the Internet can be marked and maintained as confidential. We trust that some guidance will be given by MMS on this issue.

Submission of Sales Contracts

Under Proposed Rule § 210.203, a potash producer mining on a lease with ad valorem royalty terms will be required to submit sales contracts to MMS on a quarterly basis if requested to do so. We are opposed to this new requirement for the same reasons discussed above in connection with our opposition to disclosing customer names and submitting monthly sales data organized by individual customer - it will require the disclosure of confidential information and is a requirement being imposed without a demonstrated need for the data at any point prior to an audit.

July 5, 2001

Page 5

As with customer names, if an issue involving a sales contract becomes relevant during an audit, MMS has the authority under other provisions, including 30 C.F.R. § 210.205, to request and review relevant data, including sales contracts. This is an effective method to resolve any issues regarding a sales contract and both gives MMS the access it believes it needs for audit purposes and protects what mine operators consider confidential information.

Accordingly, we request that proposed § 210.203(b)(2) be revised as follows:

1. Eliminate the word "submit" and substitute the words "make available at the mine site."
2. Eliminate the period at the end of the section and add the following: "during an audit."

For the foregoing reasons, we respectfully request that the proposed rule be revised as recommended in these comments. The changes requested, we submit, are in the public interest and will not materially affect MMS's ability to fulfill its statutory duty.

I am available to answer any questions you may have or explain further the basis for our concerns over the propose revisions.

Yours very truly,

KEMP SMITH, P.C.

By: 

CHARLES C. HIGH, JR.

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cc: John Flynt
Dan Morehouse
Don Purvis